IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 25033 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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JITENDRA BABULAL VAJA - Petitioner(s)
Versus
SHREE KESHAV CO OPERATIVE CREDIT SOCIETY LIMITED - Respondent(s)

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Appearance :
MR AR THACKER for Petitioner(s) : 1,
MR PRADIP D BHATE for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 09/03/2007

ORAL JUDGMENT

1. The petitioner – original defendant No.1 has filed this petition under Article-227 of the Constitution of India praying for quashing and setting aside the order dated 13.12.2005 passed by 6th Additional Civil Judge, Junagadh in Darkhast Application No.171 of 2003, thereby the objections raised by the present petitioner were rejected and the warrant of attachment of the properties of the petitioner was issued for recovery of the decretal amount of Rs.60,661/- alongwith the interest at the rate of 18.2% per annum and cost of Rs.1280/-.

2. The petition was admitted by this Court on 29.12.2005 and relying upon the judgment

of the Hon'ble Supreme Court in the case of **Nandi Investments & Enterprises Vs. L.M.Saravamangala, reported in (2005) 9 SCC 754**. Interim relief in terms of para-9(B) was granted. By virtue of which further proceedings of Execution Petition No.171 of 2003 pending in the Court of learned 6th Additional Civil Judge, Junagadh were stayed.

3. Mr.A.R.Thacker, learned advocate appearing for the petitioner has submitted that the petitioner obtained term loan of Rs.25,000/- from the respondent – credit society in August, 1998. The petitioner could not repay the loan amount due to his deteriorated financial condition. The respondent – credit society filed Summary Lavad Suit No.28 of 2003 before the Board of Nominees, Rajkot on 29.1.2003. Summons were issued by the Board of Nominees on the defendants. However, the same could not be served upon the petitioner – original

defendant No.1 and straightway an application was filed on the ground that the petitioner was avoiding service of summons and accordingly public notice was required to be issued in the newspaper. On that basis, public notice was issued on 3.4.2003. He has further submitted that after issuance of public notice, the Board of Nominees straightway passed an award on 16.4.2003 for Rs.60,661/- alongwith the interest at the rate of 18.2% from 1.1.1993 till the date of realization of the amount with cost of Rs.1280/-.

4. The respondent society has, thereafter, filed Execution Petition being Darkhast Case No.171 of 2003 against the petitioner before the learned 6th Additional Civil Judge, Junagadh. Notice was served upon the petitioner and the petitioner appeared before the Civil Court and filed his objections against the execution proceedings. The said objections

were, however, rejected by the learned Civil Judge and passed an order on 13.12.2005 which is under challenge in the present petition.

5. Mr.Thacker has further submitted that the petitioner has submitted an application at Ex.18 under Section-47 of the Code of Civil Procedure and as per the provision contained in the said section, the duty is cast upon the Executing Court to determine the validity of the decree. It has not been considered by the Executing Court and the objections filed by the petitioner were straightway rejected. He has further submitted that the award passed by the learned Board of Nominees in Summary Lavad Suit No.28 of 2003 is a nullity in the eye of law, because no proper service has been made by the respondent – credit society upon the petitioner. He has further submitted that the procedure prescribed under Order-5 and 37 of the Code of Civil Procedure for service of summons had not been followed

and straightway public notice was given in the newspapers and in the said notice, it is mentioned that the petitioner was avoiding the service of summons. It clearly shows that the intention of the respondent – credit society was not to follow the procedure laid down under Orders-5 and 37 of the Civil Procedure Code. He has further submitted that the respondent – credit society calculated interest and filed the suit. The award passed by the Board of Nominee is nullity. He has further submitted that the Executing Court has rejected the objections on the ground that the Court cannot go beyond the decree. The Executing Court failed to consider that the Executing Court is vested with powers under Section-47 of the Code of Civil Procedure and the Court can go beyond the decree if the decree is a nullity.

6. In support of his submissions Mr.Thacker has relied on the decision of the Hon'ble

Supreme Court in the case of **Nandi Investments & Enterprises Vs. L.M.Saravamangala (Supra)** wherein while examining the scope of review in light of the provision under Section-114 and Order-47 Rule-1 and Section-47 of Civil Procedure Code, the Court observed that power is vested in the Execution Court to go behind decree at the stage of execution. Error apparent on the face of the record can be corrected in the execution proceedings. The Judgment-debtor asserted before the High Court in review that interest on principal was added twice and interest on interest was also added in respect of decretal amount to be paid under the decree. The High Court took the view that the Executing Court had passed the order and it could not go behind the decree. The Hon'ble Supreme Court has held that the High Court should have considered the said facts and not disposed of review petition merely by observing that Executing Court had

passed the order and it could not go behind the decree. The Court further held that the High Court should have recorded a finding in respect of the said calculation. With these observations, matter was remitted to High Court for decision afresh. Relying upon the aforesaid decision Mr.Thacker submitted that the principal amount was Rs.25,000/- and suit was filed for Rs.61,000/-, which inter alia includes interest. The Board of Nominees has passed the decree of Rs.61,000/- with interest at the rate of 18.2% per annum. Thus, the interest on interest was charged. It is true that the decree has not been challenged by the petitioner and the objection was raised for the first time when the execution proceedings were initiated and recovery was enforced on the decretal amount. He has, therefore, submitted that the Executing Court has no power to enforce the recovery of Rs.61,000/- with interest at the rate of 18.2% per annum.

7. On behalf of the respondent – credit society an appearance is filed by Mr.Pradip D. Bhate, learned advocate. He did not remain present either in the first sitting or in the second sitting. The Court has, therefore, examined the submissions of Mr.Thacker on merits.

8. It is an admitted position that the decree was passed and that decree has not been challenged by the petitioner. The other issue raised by the petitioner in the present petition cannot be looked into, whether opportunity was given or not, whether summon was served or not, whether the petitioner has filed his appearance in the Board of Nominee etc, are the questions which can be looked into while hearing the appeal filed against the decree. Here in the present petition, order passed by the learned Civil Judge in execution proceeding is challenged. Based on

the judgment of the Hon'ble Supreme Court what is to be seen by the Court is as to whether interest on interest is charged and whether the recovery of the amount is sought to be enforced on such interest on interest. If the larger controversy is kept aside for the time being the position which emerges from the order is that the petitioner has not paid the principal amount. The amount is outstanding since 1998. The petitioner has also not challenged the interest charged at the rate of 18.2%, as it is contractual rate of interest. The only dispute which is raised by the petitioner is that the amount of Rs.60,661/- includes the interest calculated by the respondent – credit society at the time of filing of Lavad Suit before the Board of Nominees. Again interest cannot be charged on this amount. However, with regard to the outstanding principal amount and charging of interest at the rate of 18.2% thereon, there is no dispute and to this

extent decree has to be satisfied and if it is not satisfied the Execution Court can initiate the requisite proceedings for recovery of the said amount. Even in the judgment cited before the Court, it is an admitted position that before the decree was drawn up, the parties to the said suit filed a joint memo praying that the judgment be confirmed only to the principal amount of Rs.2,20,000/- and that other matters be left upon for final adjudication. Accordingly, on 6.1.1990, the Court of 2nd Additional Civil Judge, Mysore passed a partial decree for the principal amount of Rs.2,20,000/-. The 2nd Additional City Civil Judge, Mysore, after trial, passed a judgment on 2.2.1993 on the rest of the issue and a decree was accordingly drawn up. During the course of execution proceedings, the appellant has paid Rs.6,54,566/- to the respondent and the respondent claimed Rs.4,15,767.25 in excess by adding interest twice on the principal

amount of Rs.2,20,000/- from 30.6.1979 to 14.9.1987 and also adding interest on the interest. It is in this context, the Hon'ble Supreme Court has taken the view that when the assertion of the appellant – petitioner before the High Court was that interest on principal was added twice and that interest on interest was also added, the High Court should have considered the fact and should not have disposed of the review petition merely by observing that the executing Court had passed the order and it could not go behind the decree.

9. Considering the aforesaid judgment of the Hon'ble Supreme Court and looking to the facts and circumstances of the case, the Court is of the view that the impugned order requires limited interference by this court only to the extent that the impugned order passed by the learned 6th Additional Civil Judge, Junagadh holds good qua recovery of

outstanding principal amount with 18.2% interest thereon and cost of Rs.1280/-. Out of this amount if the outstanding principal amount is paid by the petitioner within 3 months and interest at the rate of 18.2% on this outstanding principal amount is paid by the petitioner within 3 months thereafter the present execution proceedings cannot be continued against the petitioner and the dispute with regard to interest on interest i.e difference between Rs.60,661/- and the outstanding principal amount would be adjudicated by the Executing Court afresh and whatever may be the liability that comes after that adjudication the executing proceeding would be initiated in respect thereof. It is, however, made clear that if the amount as indicated above is not paid by the petitioner within the aforesaid period, the Executing Court is free to carry on the execution proceeding with regard to entire decretal amount.

10. Subject to the aforesaid observations and directions, this petition is accordingly disposed off. Rule is made absolute to the aforesaid extent only.

(K. A. PUJ, J.)

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